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In The

Supreme Court of the United States

October Term, 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, IVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

v.

BUD ANTLE, INC. dba BUD OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF BY FRESH FRUIT & VEGETABLE WORKERS, LOCAL P-78B, AFL-CIO, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY AGRICULTURAL LABOR RELATIONS BOARD

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1. THE INTEREST OF AMICUS CURIAE FRESH FRUIT & VEGETABLE WORKERS LOCAL P-78B

Amicus curiae Fresh Fruit & Vegetable Workers, Local P-78B, CLC, AFL-CIO, is the Charging Party which brought unfair labor practice charges against BUD ANTLE, INC., before the AGRICULTURAL LABOR RELATIONS BOARD. The prosecution of those charges has been halted by the decision of the Ninth Circuit Court of Appeals in *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994).

The interest of the Union goes far beyond the protection of its members in this particular dispute with BUD ANTLE, INC. Hundreds of thousands of workers in the United States work in and about the agricultural industry, which is one of the largest industries in the nation. Numerous labor unions, including the Fresh Fruit & Vegetable Workers, represent or seek to represent these workers. Some states, including California, Idaho and Arizona, have enacted statutes regulating the labor relations between employers and workers working in agriculture who have been excluded by Congress from the protections of the Labor-Management Relations Act (LMRA), 29 U.S.C. Section 152(3). Many states have enacted labor relations statutes governing the labor relations of other types of workers, such as public employees, excluded from the protections of the LMRA.

The decision of the Ninth Circuit Court of Appeals in *Bud Antle, Inc., v. Barbosa, supra,* constructs a barrier against obtaining legal redress under these state statutory schemes by permitting an employer, after the passage of the brief six month LMRA statute of limitations, to defeat

state labor relations jurisdiction by showing that the workers in the dispute are "arguably" rather than "actually" employees under the LMRA. The concrete result of the Ninth Circuit's decision will be that workers falling in this category will be deprived of all remedy for employer unfair labor practices.

2. THIS BRIEF BRINGS TO THE COURT'S ATTENTION THE NEED TO CLARIFY THE COURT'S DECISION IN *INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS* WHICH IS NECESSARY TO BRING CERTAINTY AND FAIRNESS TO QUESTIONS OF FEDERAL/STATE LABOR RELATIONS ACT JURISDICTION

In consideration of the petition for writ of certiorari filed by the California AGRICULTURAL LABOR RELATIONS BOARD (ALRB), the Court must examine an important question of federal law not presented in the petition, which impacts squarely upon the proper accommodation of federal power and state rights. In *International Longshoreman's Association, AFL-CIO v. Davis,* 476 U.S. 380, 394 (1985), the Court held that the standard of "arguable" be applied to determine whether a person was a statutory employee for purposes of *Garmon* preemption. The important question of law presented is whether *International Longshoreman's Association, AFL-CIO v. Davis, supra,* should be clarified with regard to cases in which jurisdiction over the person(s) has been asserted by a state agency which is parallel or similar in form and content to the National Labor Relations Board (NLRB) and has been established to regulate labor relations of workers specifically excluded by the LMRA.

3. SUMMARY OF ARGUMENT

In the promulgation of the LMRA, Congress specifically excluded certain categories of workers from the protection of that statute. Since then, many states have acted to fill those voids by enacting statutory schemes similar in substance to the LMRA to cover workers left unprotected by that statute.

The determination of whether a particular worker is excluded from the protections of the LMRA can be particularly fact intensive. For example, whether a worker is an "agricultural laborer" and therefor excluded from the protections of the LMRA depends upon a factual inquiry into the exact type of work the worker performs, whether the work is performed upon the product of an independent grower, and, if so, with what regularity work is performed on the product of an independent grower.

In the context of state regulatory labor relations schemes, like the California Agricultural Labor Relations Act (ALRA), which closely parallels the LMRA, application of a standard of "arguable" to the status of workers does not serve the purposes of *Garmon* preemption because the prospect of conflict with federal labor policy is very remote or nonexistent.

Moreover, an employer can assert *Garmon* preemption in a state labor relations proceeding well after the expiration of the six month LMRA statute of limitations. Application of an "arguable" standard as to status, without a factual determination that the worker was actually subject to NLRB jurisdiction at the time of the alleged wrongs, creates a jurisdictional "no-man's land" in which a wronged worker can not obtain relief either through the

state labor relations agency or the NLRB. The purposes of both the state and federal statutory schemes are frustrated, and serious injustice results.

4. *INTERNATIONAL LONGSHOREMAN'S ASSOCIATION V. DAVIS* MUST BE CLARIFIED SO THAT THE "ARGUABLE EMPLOYEE" STANDARD NOT APPLY IN SITUATIONS WHERE PARALLEL STATE LABOR RELATIONS AGENCIES VESTED WITH REGULATING WORKERS EXCLUDED FROM THE LMRA HAVE ASSERTED JURISDICTION

The LMRA excludes by its terms a variety of workers, including "agricultural laborer(s)", domestic workers, public employees and employees of employers covered by the Railway Labor Act. 29 U.S.C. Sections 152(2),(3). Like California, many states have enacted labor relations statutes that are similar in substance and procedure to the LMRA to regulate the labor relations of those workers specifically excluded by Congress from the ambit of the LMRA. *See, e.g.*, 23 Az. Revised Statutes Annotated, Sections 23-1381 et seq. (agricultural employees); 22 Idaho Code Sections 22-4101 et seq. (agricultural employees). The California ALRA is one such statutory scheme, the provisions of which closely parallel the form and substance of the LMRA and its enforcement agency, the NLRB. Cal. Labor Code Section 1140 et seq. By its express terms, the ALRA governs only " . . . those employees excluded from coverage of the National Labor Relations Act, as amended, as agricultural employees . . . " Cal. Labor Code Section 1140.4 (b) (App. 55).

Following an evidentiary hearing that lasted numerous days, the ALRB held that it had jurisdiction over the vacuum cooler workers involved in the dispute with Bud Antle, Inc. *Bud Antle, Inc.*, 18 ALRB No. 6 (1992). Nonetheless, the Ninth Circuit Court of Appeals in *Bud Antle, Inc. v. Barbosa, supra*, applied the "arguable" employee standard set forth in *International Longshoreman's Association, AFL-CIO v. Davis, supra* at 394, to find *Garmon* preemption without engaging in an analysis of the facts pertaining to the status of the Bud Antle workers involved. (App. 4, 14-15, 27). In resolving the question whether ship superintendents were statutory employees or "supervisors", for whom parallel state labor relations acts do not exist, the Court in *Davis* took the "arguable" standard, which it had applied to activity in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), and applied it to status.

> We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts.
>
> *International Longshoreman's Association, AFL-CIO v. Davis, supra* at 394.

Since the Court's 1959 decision in *Garmon*, numerous states have passed legislation governing the labor relations of workers specifically excluded by the LMRA. In the context of state assertion of jurisdiction over persons and disputes under these statutes, the "arguable employee" standard of *International Longshoreman's Association, AFL-CIO v. Davis, supra*, must be held not to apply. In this context, the "arguable employee" standard

does not serve the purpose of *Garmon* preemption. Moreover, the application of this standard in this context creates uncertainty for those workers seeking relief from unfair labor practices and can lead to lawlessness, as has happened in this case.

A. IN THE CONTEXT OF PARALLEL STATE LABOR RELATIONS SCHEMES, THE "ARGUABLE EMPLOYEE" STANDARD DOES NOT SERVE THE PURPOSES OF GARMON

In the absence of an express Congressional declaration of preemption, *Garmon* preemption has rested upon the inference that Congress intended to deprive the states of the power to act in ways that threatened interference with the policy of industrial relations set forth in the LMRA. *San Diego Building Trades Council v. Garmon, supra* at 243-244.

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law.
>
> *San Diego Building Trades Council v. Garmon, supra* at 244.

If certain activity is merely a peripheral concern of the LMRA or touches interests deeply rooted in local feeling and responsibilities, this Court has held that *Garmon* preemption does not apply because the danger of interference "with the central aim of federal regulation" is remote. *San Diego Building Trades Council v. Garmon, supra; Farmer v. United Brotherhood of Carpenters & Joiners*

of America, Local 25, 430 U.S. 290, 296-297 (1977). For the same reason, this Court has held *Garmon* preemption not to apply where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes. *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, supra* at 296-297, 305. This Court has affirmed that these areas of nonapplication of *Garmon* preemption " . . . highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, supra* at 297.

In the context of an assertion of jurisdiction over persons by a state agency similar to the NLRB which is vested with jurisdiction over employees excluded by the LMRA, the "arguable" standard does not serve the purpose of *Garmon* preemption. In this situation, there is no danger of interference with the central aim of the federal regulatory scheme because the state rules and processes of decision are either consistent with or substantially similar to those of the NLRB. For example, the ALRA mandates that the ALRB follow the " . . . applicable precedents of the National Labor Relations Act". Cal. Labor Code Section 1148.

Moreover, the question of status, and hence jurisdiction, is necessarily intensely factual. The state agency either does or does not have jurisdiction over the person, which can be resolved in the appellate process from the

state proceedings. If jurisdiction over the person is properly asserted by the state agency, there can be no interference with the federal regulatory scheme because the involved workers have been excluded from that scheme by Congress. If the state agency does not have jurisdiction as determined by the agency or appellate courts, it has no power to act. This point seems to be precisely the one made by the Regional Director of the NLRB when, in unit clarification proceedings in 1991, she refused to retroactively assert jurisdiction over the Bud Antle workers, stating:

> The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by the Employer-Petitioner as to its status in 1989. . . . The effect of the clarification herein on the proceedings before the ALRB should be determined by the ALRB and the reviewing courts. Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not appropriately addressed herein.
>
> (App. 9-10).

One aim of the LMRA was to protect only certain types of workers, to the exclusion of others. Application of the "arguable" standard as to status of workers in the context presented here does nothing to serve the purpose of *Garmon* and only serves to strip state rights from employees who Congress has excluded from the protection of the LMRA.

In *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___ 114 S.Ct. 2239, 2251 (1994) the Court in a Railway Labor Act

case rejected the argument that action "arguably justified" by the collective bargaining agreement resulted in 29 U.S.C. Section 301 preemption. In so holding, the Court stated:

> Obviously, this test said nothing about the threshold question whether the dispute was subject to the RLA in the first place.
>
> *Hawaiian Airlines, Inc. v. Norris, supra.*

In like vein, the "arguable" standard inadequately addresses the question of whether a worker is subject to the LMRA as opposed to a state labor relations act.

B. THE DECISION OF THE NINTH CIRCUIT CREATES A JURISDICTIONAL "NO-MAN'S" LAND WHICH CAN DEPRIVE TENS OF THOUSANDS OF WORKERS OF THE PROTECTION OF LABOR RELATIONS LAWS

Over the last two decades, the NLRB has applied shifting and inconsistent standards to determine whether a worker engaged in "secondary" type activities in an agricultural concern was a statutory "employee". All of its jurisdictional standards, including the present one, depend upon facts best known to the employer. In 1976, the NLRB held in *DeCoster Egg Farms*, 223 NLRB 884 (1976), that the handling by an employee of any farm product not grown by the employer or on the employer's farm would result in a finding of employee status. Without resolving the apparent conflict created with *DeCoster*, the NLRB in 1977 decided in *Employer Members of Grower-Shipper Vegetable Association*, 230 NLRB 1011 (1977), that

workers would be considered statutory employees only if a regular and substantial portion (judged in excess of 10-15%) of their work was performed hauling or processing the crops of a grower other than their employer. In 1990, in the midst of the labor dispute in this case, the NLRB changed that standard in *Camsco Produce Company, Inc.*, 297 NLRB 905 (1990), to include as statutory employees those workers who "regularly" handle more than a de minimis amount of produce of a farmer other than the employer. The *Camsco* standard, which prevails at present, is one that is peculiarly susceptible to manipulation by employers in agriculture, who are able to rapidly manipulate contracting arrangements with other growers because of the seasonal nature of the industry. In recent years, labor unions in the agricultural sphere have seen employers make rapid, alternating claims of NLRB and ALRB jurisdiction as suits their needs.

The NLRB, ALRB and similar parallel state labor relations agencies are structured to be accessible to workers and union and employer non-lawyer representatives. Each may file unfair labor practice charges in order to invoke the legal protection of a labor relations agency. The statute of limitations is typically short; the LMRA permits the filing of an unfair labor practice charge only for a period of six (6) months after the alleged unfair labor practice. 29 U.S.C. Section 160(b).

Because of the factual nature of the NLRB'S jurisdictional standard and the brief statute of limitations, the application of the "arguable" standard to the status of a worker under *Garmon* presents the tens of thousands of persons working in the agricultural realm in California

alone with great uncertainty regarding from which agency to seek relief and for what period of time.

Moreover, the "arguable" standard when applied to employee status can and will create a jurisdictional "no-man's" land which effectively deprives workers of the protection of labor relations statutes. The Court in *International Longshoreman's Association, AFL-CIO v. Davis, supra,* held that *Garmon* preemption was jurisdictional, which could be raised by a party at any time. While "arguable" necessitates some type of showing, that showing need not be that the NLRB in fact had jurisdiction over the person. See *International Association of Longshoremen, AFL-CIO v. Davis, supra* at 395. Without examination of the jurisdictional facts and a determination that the NLRB in fact has jurisdiction over the person, a post-statute of limitations application of the "arguable" standard to status will deprive workers of the protection of both the LMRA and state labor relations statutes, when it is not even known whether the NLRB in fact had jurisdiction in the first place. Here, the Ninth Circuit neither examined the jurisdictional facts extant at the time of the alleged wrongs nor made a factual determination sufficient to premise a finding of federal jurisdiction. This result frustrates the purposes of the LMRA and the state labor relations statute and is grossly unfair.

This case is an example in point. During the thirteen years of a collective bargaining relationship preceding the 1989 labor dispute, Bud Antle and the Union stated explicitly in their collective bargaining agreements that recognition of the Union was based upon a certification by the ALRB. (App. 5). Following a break-down in collective bargaining, approximately 150 Bud Antle employees

struck and were subsequently locked out by the employer. (App. 6). In the late summer and fall of 1989, the Union and Bud Antle both filed charges with the ALRB. It was not until April, 1990, long after the expiration of the six month NLRB statute of limitations concerning Bud Antle's conduct in August and September, 1989, that Bud Antle formally challenged the ALRB'S jurisdiction in a letter to the ALRB Regional Director. (App. 7). When the Union attempted to file charges with the NLRB within six months after the unit clarification by the NLRB Regional Director, the NLRB dismissed the charges as untimely filed. (App. 9-10). The ALRB continued prosecution of the unfair labor practice charges against Bud Antle, conducting an adversarial hearing after which the ALRB Administrative Law Judge recommended a decision finding Bud Antle had committed serious and extensive unfair labor practices. Five (5) years after the eruption of the dispute, the Ninth Circuit decision brought those proceedings to a halt upon that Court's conclusion that the Bud Antle workers aggrieved by the unfair labor practices of Bud Antle, Inc., were "arguably" statutory employees. Despite the legislative efforts of Congress and the State of California, these Bud Antle workers are left without a forum for redress in a jurisdictional "no-man's" land. Without proper accommodation between federal and state labor relations jurisdictions, many more workers like them face the same fate. Surely, as the Court observed in another preemption case, Congress did not intend the primacy of NLRB jurisdiction to create "such a lawless regime." *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983).

5. CONCLUSION

When a state labor relations agency similar to the NLRB has asserted jurisdiction over a person who the agency adjudicates as excluded by the LMRA, there is little risk of conflict with the central aims of the LMRA. Moreover, the ability of an employer or union to assert *Garmon* preemption and prevail on an "arguable" standard well after the expiration of the six (6) month LMRA statute of limitations creates uncertainty and deprives wronged employees of remedy. For these reasons, the petition of the ALRB for a writ of certiorari must be granted.

DATED: June 2, 1995

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